AMERICAN LEGISLATIVE EXCHANGE COUNCIL

MEMORANDUM

To: **Civil Justice Task Force Members**
From: **Amy Kjose, Civil Justice Task Force Director**
Date: **October 27, 2011**
Re: **35 DAY MAILING – State and Nation Policy Summit: Civil Justice Task Force**

The American Legislative Exchange Council will host its State and Nation Policy Summit from **November 30 to December 2** at the **Westin Kierland Resort & Spa** in **Scottsdale, AZ.** If you have not registered for the conference, you may do so here.

About This 35-Day Mailing
This is an electronic-only 35-Day Mailing. In addition to receiving the 35-Day Mailing via e-mail, you may also access it on the Civil Justice Task Force's web page at http://www.alec.org. Keep in mind that you will need your ALEC username and password to access the 35-Day Mailing online. If you don't have an ALEC log-in, or if you'd like to change your username and password, contact Bryan Weynand at 202.379.4380 or by email at bweynand@alec.org. Conversely, if you choose to receive 35-Day Mailings "snail-mailed" to you, please let me know. We will assume that you prefer the 35-Day Mailing e-mailed to you unless you indicate otherwise.

Over-criminalization Subcommittee Conference call prior to SNPS
Civil Justice Members are invited to the Over-criminalization Subcommittee **conference call**. The call will be held on **November 4th at 11:00 AM ET**. To call in, please dial (712) 432-0075; Passcode: 448313. **Note that this call occurs prior to SNPS.** Agenda attached.

Meetings Civil Justice Task Force Members Should Attend:
- Civil Justice Task Force Meeting, **2:00pm-5:00pm, Thursday, December 1**
- Inaugural Workers' Compensation Subcommittee Meeting, **10:15am-11:15am, Wednesday, November 30**
- Workshop: Cutting Edge Trends in Deep-Pocket Lawsuits and How You Can Stop Them, **Thursday, December 1, 9:30am-10:45am**

Please find the following materials enclosed:
- SNPS Tentative Agenda, Registration Materials, and Reimbursement Policy
- Working Agenda for the Civil Justice Task Force Meeting
- Working Agenda for the Workers' Compensation Subcommittee Meeting
- Agenda for the Over-Criminalization Subcommittee conference call
- ALEC Mission Statement & Task Force Operating Procedures
- Model Legislation: Proposed Amendments to the *Products Liability Act* and a Section-by-Section Analysis
- Minutes from the Civil Justice Task Force Meeting at Annual Meeting in New Orleans

Travel and Accommodations: The conference hotel for SNPS is the **Westin Kierland Resort & Spa** located at 6902 E. Greenway Parkway, Scottsdale, AZ.

For State Legislators: Civil Justice Task Force public sector members should contact their State Chairs to inquire about scholarship money to attend the conference. See the attached reimbursement policy for procedures.

I look forward to seeing you in Scottsdale. If you have any questions or comments regarding the meeting, please contact me at (202) 742-8510 or by e-mail at akjose@alec.org

AMERICAN LEGISLATIVE EXCHANGE COUNCIL

Civil Justice Task Force Meeting

States and Nation Policy Summit | The Westin Kierland Resort & Spa | Scottsdale, AZ.
December 1, 2011 | 2:00 p.m.-5:00 p.m.

2:00 p.m.	**Welcome and Introductions** *Senator William J. Seitz, III (OH), Civil Justice Task Force Co-Chair* *Victor Schwartz, Partner, Shook, Hardy & Bacon; Civil Justice Task Force Co-Chair*
2:15 p.m.	**Task Force Update** *Amy Kjose, Civil Justice Task Force Director, ALEC*
2:20 p.m.	**Civil Justice State Legislative Reform Update** *Matt Fullenbaum, Director of Legislation, American Tort Reform Association (ATRA)*
2:30 p.m.	**PRESENTATION: Schools for Misrule: Legal Academia and an Overlawyered America** *Walter Olson, Senior Fellow, Cato Institute*
2:45 p.m.	**PRESENTATION: Should Courts or Legislatures Be Responsible for the Regulation of Greenhouse Gases?** *Mary Frontczak, Vice President and Assistant General Counsel, Peabody Energy*
3:00 p.m.	**PRESENTATION: Preventing Settlement Abuse: The Work of CCAF and the Advance Arkansas Institute** *Dan Greenberg, former member of the Arkansas House of Representatives, President of the Advance Arkansas Institute, and Senior Counsel, Center for Class Action Fairness*
3:25 p.m.	**MODEL LEGISLATION: Amendments to the *Product Liability Act*** *Victor Schwartz, Partner, Shook, Hardy & Bacon; Civil Justice Task Force Co-Chair*
3:45 p.m.	**PRESENTATION: Emerging Issues in Qui Tam Lawsuits: Targeting the Education Sector**
4:00 p.m.	**PRESENTATION: Measuring the Effects of Legal Reform on Economic Performance** *U.S. Chamber Institute for Legal Reform*
4:15 p.m.	**PRESENTATION: Stopping Government from Preventing Reasonable Settlements** *Eric Goldberg, American Insurance Association*
4:30 p.m.	**ROUNDTABLE DISCUSSION**: Legislative Victories and Prospects for 2012 *Moderated by Senator William J. Seitz, III (OH), Civil Justice Task Force Co-Chair*
4:55 p.m.	**For the Good of the Order**
5:00 p.m.	**Adjournment**

AMERICAN LEGISLATIVE EXCHANGE COUNCIL

Workers' Compensation Subcommittee

Civil Justice Task Force

States & Nation Policy Summit | Westin Kierland Resort & Spa | Scottsdale, AZ.

November 30, 2011 | 10:15 a.m.-11:15 a.m.

10:15 a.m. Call to Order, Welcome, and Introductions
Sen. Bill Cadman (CO), Subcommittee Moderator

10:30 a.m. **Discussion:** Exploring Workers' Compensation Reform
Bruce Wood, American Insurance Association
Mike Seney, Oklahoma State Chamber of Commerce

11:15 a.m. Adjourn

Overcriminalization Subcommittee
Conference Call

Friday, November 4, 2011
11:00 AM ET – 12 PM ET

Conference Line: (712) 432-0075
Host Code: 448313
Please RSVP to csullivan@alec.org

Tentative Agenda

11:00 a.m. **Welcome and Introductions**
Representative B.J. Nikkel, *CO*, Public Sector Chair
Mr. Marc Levin, *Texas Public Policy Foundation,* Private Sector Chair

11:05 a.m. **Proposed Model Legislation: Discussion and Advisory Vote**

REPEAL: "ALEC Comprehensive Asset Forfeiture Act" (2000)
"Asset Forfeiture Process and Private Property Protection Act"
Mr. Lee McGrath, *Institute for Justice*

"Resolution on Transparency and Accountability in Criminal Law"
Mr. Marc Levin, *Texas Public Policy Foundation*

11:40 a.m. **DISCUSSION: "Criminal Offense Justification Act"**
Representative BJ Nikkel, *CO*

11:55 a.m. **For the Good of the Order**

12:00 p.m. **Adjournment**

States & Nation Policy Summit

Phoenix, AZ
Nov. 30 - Dec. 2, 2011

Tuesday, November 29th

Joint Board of Directors Meetings	**7:30 am – 5:00 pm**
Registration	12:00 pm – 5:00 pm
ALEC Joint Board Reception and Dinner	6:00 pm – 9:30 pm

Wednesday, November 30th

Registration	7:30 am – 5:00 pm
Task Force Subcommittee Meetings	8:00 am – 11:30 am
Exhibits	9:00 am – 5:00 pm
State Chairs Meeting	9:00 am – 11:00 am
New Legislator Orientation	10:15 am – 11:15 am
Opening Plenary Luncheon	**11:30 am – 1:15 pm**
Task Force Chairs Meeting	1:30 pm – 2:45 pm
Workshops	1:30 pm – 4:15 pm
Welcome Reception	6:30 pm – 8:30 pm

Thursday, December 1st

Registration	7:30 am – 5:00 pm
Plenary Breakfast	**8:00 am – 9:15 am**
Exhibits	9:00 am – 5:00 pm
Workshops	9:30 am – 12:15 pm
Plenary Luncheon	**12:30 pm – 2:15 pm**
Task Force Meeting:	2:30 pm – 5:30pm

- Civil Justice
- Commerce, Insurance, and Economic Development
- Education
- Telecommunications and Information Technology

National Chairman's Reception, *by Invitation Only*	5:30 pm – 6:30 pm
Gala Holiday Reception	6:30 pm – 8:30 pm
Hospitality Suite	9:00 pm – 11:00 pm

Friday, December 2nd

Registration	7:30 am – 2:30 pm
Plenary Breakfast	**8:00 am – 9:15 am**
Exhibits	9:00 am – 5:00 pm
Workshops	9:30 am – 12:15 pm
Plenary Luncheon	**12:30 pm – 1:45 pm**
Task Force Meetings:	2:00 pm – 5:00 pm

- Energy, Environment and Agriculture
- Health and Human Services
- International Relations
- Public Safety and Elections
- Tax and Fiscal Policy

State Delegation Night — **Beginning at 6:30 pm**

2011 ALEC STATES AND NATION POLICY SUMMIT

November 30 – December 2, 2011

The Westin Kierland Hotel
6902 E. Greenway Parkway● Scottsdale, AZ 85254

States & Nation Policy Summit
Phoenix, AZ
Nov. 30 - Dec. 2, 2011

ATTENDEE REGISTRATION / HOUSING FORM

Early registration deadline: November 7, 2011
Housing cut-off date: November 7, 2011

Online
www.alec.org

Fax ***(credit cards only)***
202.331.1344

Phone / Questions
Registration 202.742.8538 (Mon-Fri, 9am-5:30 pm Eastern)
Housing 1-866-716-8137 (Available 24/7)

ATTENDEE INFORMATION

Prefix *(required)* □ Sen □ Rep □ Del □ Mr □ Mrs □ Ms □ Other _____

Last Name _____ First Name _____ Middle Initial _____ Badge Nickname _____

Title _____

Organization *(required)* _____

Mailing Address □ Business □ Home _____

City _____ State/Province _____ Country _____ ZIP/Postal code _____

Daytime phone _____ Fax _____ Alternate phone _____

Email *(confirmation will be sent by email)* _____

Emergency Contact Name _____ Daytime Phone _____ Evening Phone _____

Dietary Restrictions _____

Spouse / Guest: If registering a spouse or guest, please complete the spouse/guest registration form.

REGISTRATION INFORMATION

Registration Fees *Note: Member fees are subject to verification*	***Early*** **Until Nov 7**	***Onsite*** **Begin Nov 8**	***Daily***
□ ALEC Legislative Member	$375	$475	$245
□ Legislator / Non-Member	$475	$575	$345
□ ALEC Private Sector Member	$725	$875	$445
□ Private Sector Non-Member	$925	$1100	$545
□ ALEC Non-Profit Member (501(c)(3) status required)	$525	$625	$345
□ Non-Profit Non-Member (501(c)(3) status required)	$675	$825	$445
□ Legislative Staff / Government	$400	$500	$245
□ ALEC Alumni	$425	$525	$295
□ ALEC Legacy Member	$0	$0	$0

For Daily Registration, circle which day: Wed Thur Fri

REGISTRATION FEE : $_____

(Subtract $50 from your registration fee if you are booking at The Westin Kierland Hotel)

DISCOUNT You are eligible for $50 discount on registration fee if you are registering and booking accommodations in ALEC's room block at The Westin Kierland Hotel before November 7, 2011. Hotel reservations will be verified for those who receive discounted rate. If you receive a discount and later cancel your Westin room reservation, you will be charged (or you will be invoiced) for an additional $50 for your registration fee after the meeting.

METHOD OF REGISTRATION PAYMENT

Credit Card: Credit cards will be charged immediately.

□ Amer Express □ Visa □ MasterCard

Card # _____

Cardholder *(please print)* _____

Exp Date *(mm/yy)* _____/_____ Signature _____

REGISTRATION CONFIRMATION INFORMATION Online registrants will receive immediate email confirmation. If registering by form, confirmation will be emailed within 72 hours of receipt of payment.

Note: Registration forms with enclosed payments must be received by November 7, 2011 to be eligible for early bird registration rates. Forms and/or payments received after November 7, 2011 will be subject to on-site registration rates.

REGISTRATION CANCELLATION / REFUND INFORMATION Registrations cancelled prior to 5:00 pm Eastern November 7, 2011 are subject to a $100 cancellation fee. Registrations are non-refundable after 5:00 pm Eastern November 7, 2011. Registration fees may be transferred from one registrant to another.

All refund requests must be made in writing and sent via email to meetings@alec.org or fax to 202-331-1344.

HOUSING RESERVATION CUTOFF FOR ALEC DISCOUNTED RATE IS NOVEMBER 7, 2011

****Save $50 on registration by booking your hotel room in ALEC's room block at The Westin Kierland Hotel****

□ I do not require a reservation at this time.

Arrival Date _____ **Departure Date** _____

□ Sharing room with _____

Room type

□ Single	(1 Adult)	$ 208
□ Double	(2 Adults)	$ 208
□ Triple	(3 Adults)	$ 258
□ Quad	(4 Adults)	$ 308

Suites and upgraded accommodations are available upon request. Please call 1-866-716-8137 for additional information.

Special requests

□ ADA room required:
____ Audio ____ Visual ____ Mobile

□ Rollaway / crib: _____

□ Other: _____

_____

METHOD OF HOUSING PAYMENT

□ Please use the same method of payment as above.

Credit Card: Credit Cards will be used to guarantee the reservation.

□ Amer Express □ Visa □ MasterCard □ Discover

Card # _____

Cardholder *(please print)* _____

Exp Date *(mm/yy)* _____/_____Signature _____

** All rates DO NOT include sales tax 12.27 % (subject to change)*

Note: Cutoff for reservations at the ALEC rate is November 7, 2011. After November 7, 2011, every effort will be made to accommodate new reservations, based on availability and rate.

HOUSING CONFIRMATION INFORMATION
Online reservations will receive immediate email confirmation. Reservations received by form will be confirmed via email within 72 hours of receipt.

HOUSING CANCELLATION / REFUND INFORMATION
Credit cards will be charged one night room and tax in the event of a no show or if cancellation occurs within 72 hours prior to arrival. Please obtain a cancellation number when your reservation is cancelled.

2011 ALEC STATES AND NATION POLICY SUMMIT

November 30 – December 2, 2011

The Westin Kierland Hotel
6902 E. Greenway Parkway● Scottsdale, AZ 85254

SPOUSE/GUEST REGISTRATION FORM

STATES & NATION POLICY SUMMIT
PHOENIX, AZ
NOV. 30 - DEC. 2, 2011

Online www.alec.org | **Fax (*credit cards only*)** 202.331.1344 | **Phone / Questions** • Mon-Fri, 9am-5:30 pm Eastern Registration: 202.742.8538

ATTENDEE INFORMATION IS REQUIRED TO REGISTER A SPOUSE OR GUEST

Last Name _____ First Name _____

Organization_____

Daytime phone_____

Email (*Confirmation will be sent by email)* _____

SPOUSE / GUEST REGISTRATION

SPOUSE / GUEST REGISTRATION GUIDELINES

1. Spouse / guest registration is meant to accommodate legal spouse and immediate family members.
2. Attendees from the same organization must register independently. No exception will be made.
3. Spouse / guest designation will be clearly visible on name badge.

Last Name _____ First Name _____ Middle initial _____ Badge Nickname _____

Last Name _____ First Name _____ Middle initial _____ Badge Nickname _____

Last Name _____ First Name _____ Middle initial _____ Badge Nickname _____

SPOUSE / GUEST REGISTRATION FEES	***Number of Spouse/Guest(s)***	***Fee***	***TOTAL***
□ Spouse / Guest *please note name(s) above*	_____	$ 150	$ _____

METHOD OF SPOUSE / GUEST REGISTRATION PAYMENT
Credit Card: Credit cards will be charged immediately. Please fax to the above number for processing.

□ Amer Express
□ Visa
□ MasterCard

Card # _____
Cardholder *(please print)* _____
Exp Date *(mm/yy)* _____/_____ Signature _____

REGISTRATION CONFIRMATION INFORMATION
Online registrants will receive immediate email confirmation. If registering by form, confirmation will be emailed within 72 hours of receipt of payment.

REGISTRATION CANCELLATION / REFUND INFORMATION
Registrations cancelled prior to 5pm Eastern November 7, 2011 are subject to a $100 cancellation fee. Registrations are non-refundable after 5pm Eastern November 7, 2011.

AMERICAN LEGISLATIVE EXCHANGE COUNCIL

SCHOLARSHIP POLICY BY MEETING

ALEC Spring Task Force Summit:

1. ***Spring Task Force Summit Reimbursement Form:*** ALEC Task Force Members are reimbursed by ALEC up to $350.00 for travel expenses. Receipts must be forwarded to the ALEC Policy Coordinator and approved by the Director of Policy.
2. ALEC Task Force Members' room & tax fees for up to a two-night stay at the host hotel are covered by ALEC.
3. Registration fees are not covered; however, Task Force Members may submit registration expenses for payment from their state scholarship account upon approval of the State Chair.
4. *Official Alternate Task Force Members* (chosen by the State Chair and whose names are given to ALEC more than 35 days prior to the meeting to serve in place of a Task Force Member who cannot attend) are reimbursed in the same manner as Task Force Members.
5. ***State Scholarship Reimbursement Form***: Any fees above the set limit, or expenses other than travel and room expenses can be submitted by Task Force Members for payment from their state scholarship account upon the approval of the State Chair. Receipts must be submitted to the State Chair, who will submit the signed form to the Director of Membership.
6. *Non-Task Force Members* can be reimbursed out of the state scholarship fund upon State Chair approval. Receipts must be submitted to the State Chair, who will submit the appropriate signed form to the Director of Membership.

ALEC Annual Meeting:

State Scholarship Reimbursement Form: State scholarship funds are available for reimbursement by approval of your ALEC State Chair. Expenses are reimbursed after the conference, and may cover the cost of travel, room & tax, and registration. Receipts are to be submitted to the State Chair, who will then submit the signed form to the Director of Membership.

ALEC States & Nation Policy Summit:

1. ***States & Nation Policy Summit Reimbursement Form*:** ALEC offers <u>two</u> scholarships per state to cover the cost of travel, room & tax, and registration not to exceed <u>$1,000.00 per person</u> for a total of $2,000.00 per state. ALEC scholarship recipients must be named by the ALEC State Chair. Expenses are submitted to the State Chair and reimbursed after the conference. The State Chair submits the signed form to the Director of Membership.
2. ***State Scholarship Reimbursement Form***: Any other fees or payments must come out of the state scholarship account, with the approval of the State Chair. Receipts must be submitted to the State Chair, who submits the signed form to the Director of Membership.

ALEC Academies:

Academy Reimbursement Form: Attendees of ALEC Academies are reimbursed by the Task Force Committee hosting the Academy. Attendees will receive a form at the Academy, and will be reimbursed up to $500.00 for travel, and room & tax fees for a two-night stay by ALEC. Receipts must be forwarded to the appropriate Task Force Director and approved by the Director of Policy.

Product Liability Act

Summary: The Model Product Liability Act ("Model PLA") provides legislators with core product liability provisions reflecting the best practices of the states. Approximately twenty states have codified their product liability laws; several did so based on the original ALEC model Product Liability Act adopted in 1995 ("the 1995 Act"). The current Model PLA updates the 1995 Act to reflect three sets of developments: tort law theories advanced in legislatures and courts since 1995; product liability laws adopted in state legislatures since the 1995; and the adoption of the Restatement, Third of Torts: Products Liability in 1998. The goal of this updated Model PLA is to preserve the original intent of the 1995 Act, particularly where some courts have gone astray.

This Model PLA also assures that the ALEC's model product liability act is internally consistent with the model acts ALEC has adopted since 1995. Specifically, ALEC has adopted separate model legislation to (1) address specific areas of product liability law, such as the effect of a product's compliance with government regulations, a statute of repose, and the assumption of risk defense; (2) address reliability in expert testimony, which is applicable to any lawsuit but particularly important in product liability cases; and (3) address issues related to asbestos and silica litigation. When developing comprehensive product liability legislation, state legislators should consider incorporating these model acts, which are cross-referenced below.

{Title, enacting clause, etc.}

Section 1. {Title.}

This Act shall be known and may be cited as the Product Liability Act.

Section 2. {Definitions.}

The following shall have the meaning set forth below, unless the context clearly requires otherwise:

(A) "Claimant" means any person, including a class of persons, who brings a product liability action, and if such an action is brought through or on behalf of an estate, the term includes the claimant's decedent, or if such an action is brought through or on behalf of a minor, the term includes the claimant's parent or guardian.

(B) "Design" means the intended or known physical and material characteristics of a product and shall include any intended or known formulation or content of the product and the usual result of the intended manufacturing or other process used to produce the product.

(C) "Express warranty" means any material, positive statement, affirmation of fact, promise, or description relating to a product, including any sample or model of a product.

(D) "Harm" means:

(1) damage to property other than the product itself;

(2) personal physical injury, illness, or death;

(3) mental anguish or emotional harm; or

(4) any loss of consortium or services or other loss deriving from any type of harm described in Subsections (1), (2), or (3).

(E) "Manufacturer" means:

(1) any person who is engaged in a business to design, produce, make, fabricate, construct, or remanufacture any product (or component part of a product); or

(2) any product seller not described in Subsection (1) holding itself out as a manufacturer to the user of the product; except that any product seller who acts primarily as a wholesaler, distributor, or retailer of products may be a manufacturer with respect to a given product to the extent that such seller designs, produces, makes, fabricates, constructs, or remanufactures the product before its sale.

(F) "Material fact" means any specific characteristic or quality of the product, but does not include a general opinion about, or praise of, the product or its quality.

(G) "Person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity including any government entity or unincorporated association of persons.

(H) "Product" means any object, substance, mixture, or raw material in a gaseous, liquid, or solid state, possessing intrinsic value which is capable of delivery either as an assembled whole or as a component part and is produced for introduction to trade or commerce; but such term does not include human tissue, blood and blood products, or organs.

(I) "Product seller" means:

(1) a manufacturer; or

(2) a person who, in the course of business conducted for that purpose, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce; but such term does not include:

(a) a seller of real property, unless that person is engaged in the sale of manufactured housing or in the mass production of dwellings;

(b) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services; or

(c) any person who:

(i) acts in only a financial capacity with respect to the sale of the product;

(ii) is not a manufacturer, wholesaler, distributor, or retailer; and

(iii) leases a product, without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor.

Section 3. {Effect on other laws.}

(A) Except as excluded under paragraph (B), a product liability action includes all actions brought for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging, or labeling of any product. This Act establishes the exclusive theories of liability for any civil action for harm caused by a product, irrespective of the substantive theory or theories underlying the claim, including any action which before the effective date of the Act would have been based on any of the following theories:

(1) strict liability in tort;

(2) negligence;

(3) breach of express, implied, or statutorily established warranty;

(4) failure to discharge a duty to warn or instruct;
(5) misrepresentation, concealment, or nondisclosure; or
(6) public nuisance; or
(7) any other common law theory or theory established by statute that is the basis for an award of damages for harm caused by a product.

(B) A product liability action does not include any civil action against a manufacturer or seller for:

(1) harm caused to a product itself;
(2) damage to property under a breach of warranty theory if prohibited by the Uniform Commercial Code;
(3) commercial loss, including incidental and consequential damages in commercial setting; or
(4) commercial risks that are the subject of a contract between the manufacturer or a seller and a buyer. Suits described in Subsections (1), (2), (3), and (4) shall be governed by the Uniform Commercial Code.

(C) In any product liability action, no person is not liable to a claimant for mental anguish or emotional harm in the absence of proof of related and contemporaneous personal physical injury, illness, or death.

Section 4. {Product liability standards.}

(A) Bases of product liability. In any product liability action, a manufacturer shall be liable to a claimant if the claimant establishes all of the following by a preponderance of the evidence:

(1) the product was unreasonably dangerous when the product left the control of the manufacturer because:
a. the product contains a manufacturing defect in that it deviated in a material way from the manufacturer's specifications or from the clear majority of otherwise identical units manufactured to the same design manufacturing specifications;
b. the product is defective in design;
c. the product failed to contain adequate instructions or warnings; or
d. the product did not conform to an express warranty with respect to the product made by the manufacturer or product seller;
(2) the defendant was the manufacturer of the actual product that was the cause of harm for which the claimant seeks to recover compensatory damages; and
(3) the unreasonably dangerous aspect of the product was the proximate cause of the harm complained of by the claimant.

(B) Design defects. In any action alleging that a product is unreasonably dangerous because of a defective design, the claimant shall prove by a preponderance of the evidence that, at the time the product left the manufacturer's control:

(1) the manufacturer knew or, in light of then-existing scientific and technical knowledge, reasonably should have known of the danger that caused the claimant's harm; and
(2) there existed a technologically feasible and practical alternative design that would have reduced or avoided a foreseeable risk of harm without significantly impairing the usefulness or desirability of the product to the group of persons who are the intended users of the product.

(C) Failure to warn. In any action alleging that a product is defective because it failed to contain adequate instructions or warnings:

(1) An adequate warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and communicates sufficient information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to an ordinary consumer who purchases the product.

(2) The claimant shall prove by a preponderance of the evidence that, at the time the product left the manufacturer's control, the manufacturer knew or, in light of then-existing scientific and technical knowledge, reasonably should have known of the danger that caused the claimant's harm.

3) A manufacturer shall not be liable for failure to instruct or warn about a danger that is known or open and obvious to the user or consumer of the product, or should have been known or open and obvious to the user or consumer of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume the product.

(D) Express warranty. A product may be unreasonably dangerous because it did not conform to an express warranty only if the claimant proves by a preponderance of the evidence that:

(1) the claimant (or a person acting on the claimant''s behalf) reasonably relied on an express warranty made by the manufacturer about a material fact concerning the safety of the product;

(2) this express warranty proved to be untrue; and

(3) had the representation been true, the claimant would not have been harmed. A manufacturer may be subject to liability under this section although it did not engage in negligent or fraudulent conduct in making the express warranty.

Section 5. {Misuse and modification.}

A product liability action may not be commenced or maintained against a product seller if, at the time the injury, death, or property damage occurred, the product was misused, altered, or modified in a manner that was not reasonably foreseeable, and such misuse, alteration, or modification of the product was a cause of the injury, death, or property damage.

Section 6. {Learned intermediary doctrine}

A prescription drug is not defective due to an inadequate warning or instruction if its manufacturer provides otherwise adequate warning or instruction to the physician or other legally authorized person who prescribes or dispenses that prescription drug for the claimant.

Section 7. {Warnings to third parties.}

In any product liability action based on the failure to provide adequate warnings or instructions, the manufacturer shall not be liable if:

(A) The product was used in a workplace, and the manufacturer provided warnings or instructions to the employer of the claimant, because there was no practical and feasible means of transmitting them directly to the claimant;

(B) The product was sold as a component or material to be incorporated into another product, and the manufacturer provided warnings or instructions to the manufacturer's immediate buyer, and the claimant was exposed to the component or material after it was incorporated or converted into another product; or

(C) The product was one that may legally be used or dispensed only by or under the supervision of a class of experts and the manufacturer employed means reasonably calculated to make warnings or instructions available to the using or supervising expert. As used in this subsection, "“means reasonably calculated to make warnings or instructions available"” does not require actual, personal notice to the expert where such personal notice would be impossible or impracticable.

Section 8. {Liability of product sellers.}

(A) No product liability action may be asserted against a product seller other than the manufacturer, unless:

(1) the product seller exercised substantial control over the aspect of the design, testing, manufacture, packaging, or labeling of the product that caused the alleged harm for which recovery of damages is sought;

(2) the product seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought;

(3) the product seller made an express warranty as to such product independent of any express warranty made by a manufacturer as to such product, such product failed to conform to the product seller's warranty, and the failure of such product to conform to the warranty caused the harm complained of by the claimant;

(4) the claimant is unable, despite a good faith exercise of due diligence, to identify the manufacturer of the product;

(5) the manufacturer is not subject to service of process under the laws of the state; or

(6) the court determines that the claimant would be unable to enforce a judgment against the manufacturer;

(B) A product seller other than a manufacturer is liable to a claimant on the basis of negligence if the claimant establishes that:

(1) the product seller sold the product involved in such action;

(2) the product seller did not exercise reasonable care: (a) in assembling, inspecting, or maintaining such product; or (b) in passing on warnings or instructions from such product’s manufacturer about the dangers and proper use of such product; and

(3) such failure to exercise reasonable care was a proximate cause of the harm complained of by the claimant.

Section 9. {Alcohol and drug defense.}

In any product liability action a manufacturer shall not be liable if:

(A) The claimant was under the influence of intoxicating alcohol or any non-over-the counter drug which has not been prescribed by a physician for use by the claimant; and

(B) The claimant as a result of the influence of the alcohol or drug was more than 50 percent at fault for such claimant's harm.

Section 10. {Subsequent remedial measures.}

(A) In any product liability action, evidence of any measure taken by a manufacturer after the occurrence of a claimant's harm which, if taken previously, would have made the harm less likely to occur is not admissible to prove liability.

(B) Evidence described in Subsection (A) may be admitted only if necessary:

(1) to prove ownership, control, or feasibility of precautionary measures, if these issues are controverted; or
(2) for impeachment.

Section 11. {Concert of action.}

In any product liability action, a manufacturer or product seller shall not be liable to the claimant on any theory of express or implied agreement among sellers, parallel behavior, or independent adherence to industry-wide standards unless the claimant proves, by a preponderance of the evidence, that the seller engaged in concert of action. "Concert of action" means the conscious and deliberate agreement to, acknowledgment of, and collaborative participation in wrongful conduct by two or more persons who do not have the relationship of master and servant, principal and agent, parent and subsidiary, affiliates, or employer and employee.

Section 12. {Product Identification Requirement}

Proof that the product seller designed, formulated, produced, constructed, created, assembled, or rebuilt the type of product in question is not proof that the product seller formulated, produced, constructed, created, assembled, or rebuilt the actual defective product in the product liability action. A product seller may not be held liable in a product liability action based on market share, enterprise, or industry-wide liability.

Section 13. {Incorporation of Other ALEC Model Acts.}

(A) The REGULATORY COMPLIANCE CONGRUITY WITH LIABILITY ACT offers three options for addressing the impact of a product's compliance with government standards or agency approval of its design or warnings on liability.

(B) The TEN-YEAR STATUTE OF REPOSE ACT provides that an injury occurring ten years after a product is sold is presumed to not result from a defect in the product, with certain exceptions.

(C) The ASSUMPTION OF RISK ACT provides that a product seller (or other defendant) is not liable where the claimant knew of and appreciated the risk, and voluntarily encountered it.

(D) The RELIABILITY IN EXPERT TESTIMONY STANDARDS ACT adopts standards and procedures for admissibility of expert testimony that apply in federal courts and most state courts.

(E) The TRANSPARENCY IN LAWSUITS PROTECTION ACT provides that a court shall not create a new private right of action on the basis of a statute that provides regulatory requirements, such as product safety standards, unless the state legislature specifically provides a right to sue.

(F) The ASBESTOS AND SILICA CLAIMS PRIORITIES ACT ensures that those who are truly sick from exposure to asbestos or silica receive prompt, fair and efficient adjudication of their claims by requiring claimants to meet certain medical criteria for showing a physical impairment before proceeding with their claims.

(G) The ASBESTOS CLAIMS TRANSPARENCY ACT assures that courts and litigants have available to them information as to payments an asbestos claimant has or may receive from asbestos-related bankruptcy trusts.]

Section 14. {Severability clause.}

Section 15. {Repealer clause.}

Section 16. {Effective date.}

Product Liability Act

Summary: The Model Product Liability Act ("Model PLA") provides legislators with core product liability provisions reflecting the best practices of the states. Approximately twenty states have codified their product liability laws; several did so based on the original ALEC model Product Liability Act adopted in 1995 ("the 1995 Act"). The current Model PLA updates the 1995 Act to reflect three sets of developments: tort law theories advanced in legislatures and courts since 1995; product liability laws adopted in state legislatures since the 1995; and the adoption of the Restatement, Third of Torts: Products Liability in 1998. The goal of this updated Model PLA is to preserve the original intent of the 1995 Act, particularly where some courts have gone astray.

This Model PLA also assures that the ALEC's model product liability act is internally consistent with the model acts ALEC has adopted since 1995. Specifically, ALEC has adopted separate model legislation to (1) address specific areas of product liability law, such as the effect of a product's compliance with government regulations, a statute of repose, and the assumption of risk defense; (2) address reliability in expert testimony, which is applicable to any lawsuit but particularly important in product liability cases; and (3) address issues related to asbestos and silica litigation. When developing comprehensive product liability legislation, state legislators should consider incorporating these model acts, which are cross-referenced below.

{Title, enacting clause, etc.}

Section 1. {Title.}

This Act shall be known and may be cited as the Product Liability Act.

Section 2. {Definitions.}

The following shall have the meaning set forth below, unless the context clearly requires otherwise:

(A) "Claimant" means any person, including a class of persons, who brings a product liability action, and if such an action is brought through or on behalf of an estate, the term includes the claimant's decedent, or if such an action is brought through or on behalf of a minor, the term includes the claimant's parent or guardian.

(B) "Design" means the intended or known physical and material characteristics of a product and shall include any intended or known formulation or content of the product and the usual result of the intended manufacturing or other process used to produce the product.

(C) "Express warranty" means any material, positive statement, affirmation of fact, promise, or description relating to a product, including any sample or model of a product.

(D) "Harm" means:

(1) damage to property other than the product itself;

(2) personal physical injury, illness, or death;

(3) mental anguish or emotional harm; or

(4) any loss of consortium or services or other loss deriving from any type of harm described in Subsections (1), (2), or (3).

(~~D~~E) "Manufacturer" means:

(1) any person who is engaged in a business to design, produce, make, fabricate, construct, or remanufacture any product (or component part of a product); or

(2) any product seller not described in Subsection (1) holding itself out as a manufacturer to the user of the product; except that any product seller who acts primarily as a wholesaler, distributor, or retailer of products may be a manufacturer with respect to a given product to the extent that such seller designs, produces, makes, fabricates, constructs, or remanufactures the product before its sale.

(E) "F) "Material fact" means any specific characteristic or quality of the product, but does not include a general opinion about, or praise of, the product or its quality.

(G) "Person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity including any government entity or unincorporated association of persons.

(FH) "Product" means any object, substance, mixture, or raw material in a gaseous, liquid, or solid state, possessing intrinsic value which is capable of delivery either as an assembled whole or as a component part and is produced for introduction to trade or commerce; but such term does not include human tissue, blood and blood products, or organs.

(GI) "Product seller" means:

(1) a manufacturer; or

(2) a person who, in the course of business conducted for that purpose, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce; but such term does not include:

(a) a seller of real property, unless that person is engaged in the sale of manufactured housing or in the mass production of dwellings;

(b) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services; or

(c) any person who:

(i) acts in only a financial capacity with respect to the sale of the product;

(ii) is not a manufacturer, wholesaler, distributor, or retailer; and

(iii) leases a product, without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor.

Section 3. {Effect on other laws.}

(A) Except as excluded under subsectionparagraph (B), any civila product liability action includes all actions brought against a manufacturer or product seller for harm caused by a product is a product liability action and is governed by the provisions of the Actfor or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging, or labeling of any product. This Act is intended to governestablishes the exclusive theories of liability for any civil action for harm caused by a product, irrespective of the substantive theory or theories underlying the claim, including any action which before the effective date of the Act would have been based on any of the following theories:

(1) strict liability in tort;

(2) negligence;
(3) breach of express, implied, or statutorily established warranty;
(4) failure to discharge a duty to warn or instruct;
(5) misrepresentation, concealment, or nondisclosure; ~~or~~
(6) public nuisance; or
(7) any other common law theory or theory established by statute that is the basis for an award of damages for harm caused by a product.

(B) A product liability action does not include any civil action against a manufacturer or seller for:
(1) harm caused to a product itself;
(2) damage to property under a breach of warranty theory if prohibited by the Uniform Commercial Code;
(3) commercial loss, including incidental and consequential damages in commercial setting; or
(4) commercial risks that are the subject of a contract between the manufacturer or a seller and a buyer. Suits described in Subsections (1), (2), (3), and (4) shall be governed by the Uniform Commercial Code.

(C) In any product liability action, ~~the product seller~~no person is ~~not~~ liable to a claimant for mental anguish or emotional harm in the absence of proof of related and contemporaneous personal physical injury, illness, or death.

Section 4. {~~Standards~~Product liability standards.}

(A) Bases of product liability.} In any product liability action, a manufacturer shall be liable to a claimant ~~if and only~~ if the claimant establishes all of the following by a preponderance of the evidence ~~that~~:
(~~A~~1) the product was unreasonably dangerous~~:~~
~~(1) in construction;~~(2) when the product left the control of the manufacturer because:
a. the product contains a manufacturing defect in that it deviated in a material way from the manufacturer's specifications or from the clear majority of otherwise identical units manufactured to the same design manufacturing specifications;
b. the product is defective in design;
c. the product failed to contain adequate instructions or warnings; or
d. the product did not conform to an express warranty with respect to the product made by the manufacturer or product seller;
~~(3) in design; or~~
~~(4) because the manufacturer failed to provide adequate warnings or instructions;~~(B2) the defendant was the manufacturer of the ~~particular~~actual product ~~unit~~ that ~~caused~~was the cause of harm for which the claimant~~'s harm~~ seeks to recover compensatory damages; and
(~~C~~3) the unreasonably dangerous aspect of the product was the proximate cause of the harm complained of by the claimant.

~~**Section 5. {Government standards.}**~~

~~In any product liability action, a manufacturer shall not be liable to a claimant if the aspect of the product alleged to have caused the claimant's harm compiled in material respects, at the time of manufacture, with standards, conditions, or specifications established, adopted, or approved~~

~~by a federal or state statute or by an agency of the federal or state government responsible for the design formulation, labeling, packaging, performance, or approval of the product, unless the claimant proves by clear and convincing evidence that the defendant intentionally and fraudulently withheld from or misrepresented to the agency information known to be material and relevant to the harm in question.~~

~~**Section 6. {Defectless products.}**~~

~~In any product liability action, a manufacturer shall not be liable for harm caused by an inherent characteristic of the product that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community.~~

(B) Design defects. In any action alleging that a product is unreasonably dangerous because of a defective design, the claimant shall prove by a preponderance of the evidence that, at the time the product left the manufacturer's control:

(1) the manufacturer knew or, in light of then-existing scientific and technical knowledge, reasonably should have known of the danger that caused the claimant's harm; and

(2) there existed a technologically feasible and practical alternative design that would have reduced or avoided a foreseeable risk of harm without significantly impairing the usefulness or desirability of the product to the group of persons who are the intended users of the product.

~~**Section 7. {Misuse and modification.}**~~

~~In any product liability action, a manufacturer shall not be liable for harm caused by product misuse, alteration, or modification. Misuse, alteration, or modification shall include but is not limited to:~~

~~(1) any use, alteration, or modification contrary to or inconsistent with a manufacturer's warnings or instruction; or~~

~~(2) any use, alteration, or modification involving a risk of harm which was known or~~

(C) Failure to warn. In any action alleging that a product is defective because it failed to contain adequate instructions or warnings:

(1) An adequate warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and communicates sufficient information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to an ordinary consumer who purchases the product.

(2) The claimant shall prove by a preponderance of the evidence that, at the time the product left the manufacturer's control, the manufacturer knew or, in light of then-existing scientific and technical knowledge, reasonably should have known of the danger that caused the claimant's harm.

~~should have been known by the ordinary person who uses or consumes~~(3) A manufacturer shall not be liable for failure to instruct or warn about a danger that is known or open and obvious to the user or consumer of the product, or should have been known or open and obvious to the user or consumer of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume the product.

~~**Section 8. {Construction defects.}**~~

~~In any product liability action, a product may be unreasonably dangerous because it is defective in manufacture or construction only if the claimant proves by a preponderance of the evidence that, when the product left the control of the manufacturer, it deviated in a material way from the established design specifications, formula, or performance standards of the manufacturer, or from the clear majority of otherwise identical units manufactured to the same design specifications, formula, or performance standards.~~

~~Section 9. {~~(D) Express warranty.~~}~~ ~~(A) In any product liability action, a~~ A product may be unreasonably dangerous because it did not conform to an express warranty only if the claimant proves by a preponderance of the evidence that:

(1) the claimant (or a person acting on the claimant~~'~~'s behalf) reasonably relied on an express warranty made by the manufacturer about a material fact concerning the safety of the product;

(2) this express warranty proved to be untrue; and

(3) had the representation been true, the claimant would not have been harmed.

~~(B) "Express warranty" means any material, positive statement, affirmation of fact, promise, or description relating to a product, including any sample or model of a product.~~

~~(C) "Material fact" means any specific characteristic or quality of the product, but does not include a general opinion about, or praise of, the product or its quality.~~

~~(D)~~ A manufacturer may be subject to liability under this section although it did not engage in negligent or fraudulent conduct in making the express warranty.

Section ~~10. {Knowledge of danger.}~~5. {Misuse and modification.}

~~In any~~

A product liability action ~~based upon defective design, a manufacturer shall not be liable unless the claimant proves by a preponderance of the evidence that, at the time the product left the manufacturer's control, the manufacturer knew or, in light of then existing scientific and technical knowledge, reasonably should have known of the danger that caused the claimant's harm.~~

~~Section 11. {Feasible alternative design.}~~

~~In any product liability action based upon defective design, a manufacturer shall not be liable unless the claimant proves by a preponderance of the evidence that, at the time the product left the manufacturer's control, there existed a practical and technically feasible alternative design or formulation that would have prevented the harm without significantly impairing the usefulness or desirability of the product to the group of persons who are the intended users of the product.~~

~~Section 12. {Unavoidably unsafe products.}~~

~~On any product liability action, a manufacturer is not liable to the claimant for harm caused by an unavoidably unsafe aspect of a drug, biological, or medical device unless the claimant proves by a preponderance of the evidence that:~~

~~(A) At the time the product left the manufacturer's control, the manufacturer knew or, in light of then existing and reasonably available scientific and technical knowledge, reasonably should have known of the danger that caused the claimant's harm; and~~

~~(B) The manufacturer failed to provide adequate warnings or instructions. An aspect of a product shall be considered unavoidably unsafe unless the danger could have been eliminated by~~

~~use of an existing, practical, and technically feasible alternative design or formulation that would have prevented the harm without significantly impairing the usefulness or desirability of the product to the group of persons who are the intended users of the product. An adequate warning is either:~~

~~(1) one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger; or~~

~~(2) one that conforms to the requirements of a federal or state statute or agency regulation or the conditions of the approval of a product by a federal or state agency that prescribes the form or language of the warning or instruction.~~

~~Section 13. {Assumption of the risk.}~~

~~(A) In any tort action, a defendant shall not be liable if the injured person assumed the risk of injury or harm to property. Assumption of the risk shall mean that the injured risk of injury or harm to property. Assumption of the risk shall mean that the injured person:~~

~~(1) knew of and appreciated the risk; and~~

~~(2) voluntarily exposed himself or herself to the danger that proximately caused the injury or damage.~~

~~(B) The elements of assumption of the risk may be inferred, as a matter of either fact or law, from circumstantial evidence that the injured person must have known and appreciated the risk and voluntarily encountered it.~~ may not be commenced or maintained against a product seller if, at the time the injury, death, or property damage occurred, the product was misused, altered, or modified in a manner that was not reasonably foreseeable, and such misuse, alteration, or modification of the product was a cause of the injury, death, or property damage.

Section ~~14. {Warnings.}~~

~~(A) In any product liability action, a manufacturer shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction. An adequate warning is either:~~

~~(1) one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger; or~~

~~(2) one that conforms to the requirements of a federal or state statute or agency regulation or the conditions of the approval of a product by a federal or state agency that prescribes the form or language of the warning or instruction.~~

~~(B) In any product liability action based on the failure to provide adequate warnings or instructions, the manufacturer shall not be liable for failure to warn or instruct about:~~

~~(1) a danger that is an open and obvious risk or that is a matter of common knowledge;~~

~~(2) a product misuse, alteration or modification, which means:~~

~~(a) any use, alteration or modification contrary to or inconsistent with a manufacturer's warnings or instruction; or~~

~~(b) any use, alteration, or modification involving any risk of harm which was known or should have been known by the ordinary person who uses or consumes the product.~~ **6. {Learned intermediary doctrine}**

A prescription drug is not defective due to an inadequate warning or instruction if its manufacturer provides otherwise adequate warning or instruction to the physician or other legally authorized person who prescribes or dispenses that prescription drug for the claimant.

Section ~~15.~~7. {Warnings to third parties.}

In any product liability action based on the failure to provide adequate warnings or instructions, the manufacturer shall not be liable if:

(A) The product was used in a workplace, and the manufacturer provided warnings or instructions to the employer of the claimant, because there was no practical and feasible means of transmitting them directly to the claimant;

(B) The product was sold as a component or material to be incorporated into another product, and the manufacturer provided warnings or instructions to the manufacturer's immediate buyer, and the claimant was exposed to the component or material after it was incorporated or converted into another product; or

(C) The product was one that may legally be used or dispensed only by or under the supervision of a class of experts and the manufacturer employed means reasonably calculated to make warnings or instructions available to the using or supervising expert. As used in this subsection, "~~"~~means reasonably calculated to make warnings or instructions available~~"~~" does not require actual, personal notice to the expert where such personal notice would be impossible or impracticable.

Section ~~16.~~8. {Liability of product sellers.}

(A) ~~A product seller shall be liable for harm to the claimant caused by a product as if the~~No product liability action may be asserted against a product seller ~~were~~other than the manufacturer ~~of the product if~~, unless:

~~(1) the manufacturer is not subject to service of process under the laws of the state; or~~

~~(2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer.~~

~~(B) A product seller other than a manufacturer is liable to a claimant for the failure of the product involved in such action to conform to a warranty made with respect to such product if the claimant establishes by a preponderance of the evidence that:~~

(1) the product seller ~~sold such product~~exercised substantial control over the aspect of the design, testing, manufacture, packaging, or labeling of the product that caused the alleged harm for which recovery of damages is sought;

(2) the product seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought;

(3) the product seller made an express warranty as to such product independent of any express warranty made by a manufacturer as to such product~~;(3),~~ such product failed to conform to the product seller's warranty~~;~~, and~~(4)~~ the failure of such product to conform to ~~such~~the warranty caused the harm complained of by the claimant~~.~~;

(~~C~~4) the claimant is unable, despite a good faith exercise of due diligence, to identify the manufacturer of the product;

(5) the manufacturer is not subject to service of process under the laws of the state; or

(6) the court determines that the claimant would be unable to enforce a judgment against the manufacturer;

(B) A product seller other than a manufacturer is liable to a claimant on the basis of negligence if the claimant establishes ~~by a preponderance of the evidence~~ that:

(1) the product seller sold the product involved in such action;

(2) the product seller did not exercise reasonable care: (a) in assembling, inspecting, or maintaining such product; or (b) in passing on warnings or instructions from such product's manufacturer about the dangers and proper use of such product; and

(3) such failure to exercise reasonable care was a proximate cause of the harm complained of by the claimant.

Section ~~17.~~9. {Alcohol and drug defense.}

In any product liability action a manufacturer shall not be liable if:

(A) The claimant was under the influence of intoxicating alcohol or any non-over-the counter drug which has not been prescribed by a physician for use by the claimant; and

(B) The claimant as a result of the influence of the alcohol or drug was more than 50 percent at fault for such claimant's harm.

Section ~~18.~~10. {Subsequent remedial measures.}

(A) In any product liability action, evidence of any measure taken by a manufacturer after the occurrence of a claimant's harm which, if taken previously, would have made the harm less likely to occur is not admissible to prove liability.

(B) Evidence described in Subsection (A) may be admitted only if necessary:

(1) to prove ownership, control, or feasibility of precautionary measures, if these issues are controverted; or

(2) for impeachment.

Section ~~19. {Expert opinion~~11. {Concert of action.}

~~In any product liability action, expert technical, scientific, or medical opinion shall not be admitted unless:~~

~~(A) The expert is professionally qualified in the relevant discipline; and~~

~~(B) Such opinion is corroborated by other objective evidence which is consistent with generally accepted technical, medical, or scientific principles.~~

~~Section 20. {Concert of action.}~~

In any product liability action, a manufacturer or product seller shall not be liable to the claimant on any theory of express or implied agreement among sellers, parallel behavior, or independent adherence to ~~industrywide~~industry-wide standards unless the claimant proves, by a preponderance of the evidence, that the seller engaged in "~~"~~concert of action.~~" "~~" "Concert of action~~"~~" means the conscious and deliberate agreement to, acknowledgment of, and collaborative participation in wrongful conduct by two or more persons who do not have the relationship of master and servant, principal and agent, parent and subsidiary, affiliates, or employer and employee.

Section ~~21. {Severability clause.~~12. {Product Identification Requirement}

Proof that the product seller designed, formulated, produced, constructed, created, assembled, or rebuilt the type of product in question is not proof that the product seller formulated, produced, constructed, created, assembled, or rebuilt the actual defective product in the product liability action. A product seller may not be held liable in a product liability action based on market share, enterprise, or industry-wide liability.

Section 13. {Incorporation of Other ALEC Model Acts.}

[(A) The REGULATORY COMPLIANCE CONGRUITY WITH LIABILITY ACT offers three options for addressing the impact of a product's compliance with government standards or agency approval of its design or warnings on liability.

(B) The TEN-YEAR STATUTE OF REPOSE ACT provides that an injury occurring ten years after a product is sold is presumed to not result from a defect in the product, with certain exceptions.

(C) The ASSUMPTION OF RISK ACT provides that a product seller (or other defendant) is not liable where the claimant knew of and appreciated the risk, and voluntarily encountered it.

(D) The RELIABILITY IN EXPERT TESTIMONY STANDARDS ACT adopts standards and procedures for admissibility of expert testimony that apply in federal courts and most state courts.

(E) The TRANSPARENCY IN LAWSUITS PROTECTION ACT provides that a court shall not create a new private right of action on the basis of a statute that provides regulatory requirements, such as product safety standards, unless the state legislature specifically provides a right to sue.

(F) The ASBESTOS AND SILICA CLAIMS PRIORITIES ACT ensures that those who are truly sick from exposure to asbestos or silica receive prompt, fair and efficient adjudication of their claims by requiring claimants to meet certain medical criteria for showing a physical impairment before proceeding with their claims.

(G) The ASBESTOS CLAIMS TRANSPARENCY ACT assures that courts and litigants have available to them information as to payments an asbestos claimant has or may receive from asbestos-related bankruptcy trusts.]

Section 14. {Severability clause.}

Section ~~22.~~15. {Repealer clause.}

Section ~~23.~~16. {Effective date.}

Amendments to Product Liability Act
Section-by-Section Analysis

Section 1. {Title.}

Section 1 retains the existing title of the model act, the Product Liability Act.

Section 2. {Definitions.}

Sets forth definitions applicable to the model act. These definitions have not changed from the 1995 Act, except for the addition of definitions for "express warranty" and "material fact," and a clarification that "claimant" includes class actions.

Section 3. {Effect on other laws.}

Section 3, as with the 1995 Act, states that the Model PLA is intended to serve as the exclusive basis for claims arising out of harms caused by products. Courts in several states, including Arkansas, Colorado, Connecticut, Louisiana, New Jersey, Texas and Washington, that have adopted product liability statutes follow this sound approach. *See, e.g., Persichini v. Brad Ragan, Inc.*, 735 P.2d 168 (Colo. 1987) (the PLA applies to claims pled under negligence); *Winslow v. Lewis-Shepard Inc.*, 562 A.2d 517 (Conn. 1989) (the PLA provides the exclusive remedy for claims failing within its scope); *Washington St. Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993) (the PLA "created a single cause of action for product-related harms, and supplants previously existing common law remedies.").

In these and other states, there have been several attempts since 1995 to circumvent product liability law and subject product manufacturers to tort law generally. These efforts involve novel tort theories or novel applications of traditional tort theories to go after the deep pocket manufacturer, often regardless of fault. Consider these three prominent examples:

- In high-profile industry litigation over lead paint, firearms and other products, some have tried to subject product manufacturers to public nuisance liability for harms caused by individuals who misused the products, for example by allowing lead paint to fall into a state of disrepair or through criminal gun violence. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541 (2006). In these cases, it is not alleged that the products were defective, which is the linchpin for liability under products liability law. This effort has largely failed. *See Rhode Island v. Lead Indus. Ass'n Inc.*, 951 A.2d 428, 435, 440 (R.I. 2008); *In re: Lead Paint Litigation*, 924 A.2d 484 (N.J. 2007).

- In pharmaceutical litigation, individuals are seeking to subject manufacturers of brand-name drugs to liability for their harms, even though they fully acknowledge that they only took only generic versions of those drugs, which were manufactured by someone else. This litigation violates the bedrock product liability law principle that one can only sue the company that made the actual product that allegedly caused the harm – not its competitors. While courts in nearly twenty states have rejected these theories, a couple of courts have permitted them. *See*, *e.g.*, *Conte v. Wyeth*, 85 Cal.Rptr.3d 299 (Cal Ct. App. 2008).

- Product liability claims are routinely cast as consumer protection claims to avoid the need to show an actual physical injury and causation. One recent class action brought on behalf of uninjured cell phone users claimed that radiation from their use placed them at risk of developing cancer, but that the manufacturers represented such products as safe. *See Farina v. Nokia*, 625 F. 3d 97 (3d Cir. 2010) (dismissing claim on basis of federal preemption), *cert. denied*, 2011 WL 4536521 (Oct. 3, 2011). Likewise, plaintiffs' lawyers often attack the safety of prescription drugs under state consumer protection statutes by alleging that they were not as safe or beneficial, or had greater risk, than the manufacturer represented. *See* James P. Muehlberger & Cary Silverman, *Lawsuits Without Injury: The Rise of Consumer Protection Claims*, HarrisMartin Columns: Drugs & Supplements, Oct. 2006, at 4. Such methods attempt to eliminate the need to show the product had an inadequate warning or harmed a patient, as required by product liability law.

To assure courts will interpret paragraph (A)(5) as precluding efforts to circumvent the PLA, revisions have been made to paragraph (A) clarifying this point. For example, it makes clear that the Product Liability Act "establishes the *exclusive* theories of liability for any civil action for harm caused by a product." The precise language in (A)(5) follows provisions in PLAs enacted in the states listed above where courts have validated that the PLA provides the exclusive remedy for harms caused by products. Also, paragraph (A)(6) expressly adds public nuisance theory to the exclusivity provision of the model act. Such a provision was added to the Ohio PLA after firearm and lead paint litigation was allowed to proceed in that state. *See* 2006 Ohio Am. Sub. S.B. 117 (codified as amended at Ohio Rev. Code Ann. § 2307.71(13)(c)).

Section 4. {Product liability standards.}

Section 4 provides the core of the Product Liability Act. Paragraph (A) follows the general structure of the 1995 Act with minor revisions to reflect the terminology used Section 2 of the Restatement Third, such as "manufacturing" defect, rather than "construction" defect. In addition, Paragraph (A)(2) follows language added to the Ohio PLA emphasizing that only the manufacturer of the *actual* product that caused the plaintiff's injury is subject to a product liability lawsuit. Thus, in no case is the manufacturer of one product liable for an injury caused by a product made by a competitor. This principle may seem to be commonsense, but as discussed above, courts have entertained claims imposing liability on a manufacturer without requiring any showing that the manufacturer made the actual product causing the plaintiff's harm. Such claims are contrary to the basic foundation of product liability law, which imposes liability on the actual manufacturer because it is the one who had control of the product, had the ability to improve its safety, and profited from its sale.

Section 4 incorporates several other sections from the 1995 Act in order to provide a unified standard for product liability. Specifically,

- The old Section 8 ("Construction Defects") is incorporated into Paragraph (A)(1)(a);
- The old Section 9 ("Express Warranty") is in Paragraph (D);
- The old Section 10 ("Knowledge of the Danger") is in Paragraph (B)(1);
- The old Section 11 ("Feasible Alternative Design") is in Paragraph (B)(2); and
- The old Section 14 ("Warnings") is in Paragraph (C).

As mentioned above, wording as been slightly modified to reflect principles in the Restatement Third and state PLAs that have been enacted since 1995. *See, e.g.*, Miss. Code § 11-1-63.

Section 5. {Misuse and modification.}

Section 5 of the Product Liability Act replaces Section 7 of the 1995 Act. The 1995 Act provided an absolute defense in cases where the plaintiff misused a product, or the plaintiff or a third party altered or modified a product post-sale. The revised Model PLA limits the defense to misuse, alterations, or modifications that were not *reasonably foreseeable* to the product seller. A product seller has no duty to protect against an unforeseeable misuse, alteration, or modification. The change follows the laws of many states and the principles of the Restatement Third, that reasonably foreseeable misuses, alterations, and modifications may be relevant to the determination of defect, causation, or comparative responsibility. *See* Restatement Third § 2 cmt. p; *see also* Colo. Rev. Stat. § 13-21-402.5; Mich. Rev. Stat. § 600.2947(1), (2).

For example, if a misuse is foreseeable, a seller could have adopted a reasonable alternative design or provided additional instructions or warnings. In such cases, it may not be appropriate to fully eliminate a plaintiffs' recovery. The plaintiff's recovery can be reduced, though, by his or her degree of fault in misusing, altering, or modifying the product.

Section 6. {Learned intermediary doctrine}

Section 6 codifies the "learned intermediary doctrine," which was not addressed in the 1995 Act. The learned intermediary doctrine provides that manufacturers or suppliers of prescription drugs fulfill their duty to warn consumers of the dangerous propensities of their products by conveying accurate warning information to prescribing physicians. It is the physician's duty to evaluate the medication's benefits and risks for the individual patient. The rule, in effect, directs a manufacturer's legal duty to warn toward physicians, rather than individual consumers.

Almost all jurisdictions follow some formulation of the learned intermediary doctrine with regard to claims involving prescription drugs. *See In re Norplant Contraceptive Prods. Liab. Litig.*, 215 F. Supp.2d 795, 806-09 (E.D. Tex. 2002) (concluding that forty-eight states, the District of Columbia and Puerto Rico have either applied or recognized the learned intermediary doctrine, and providing chart reflecting the same). Courts have cited several reasons for supporting this doctrine. First, training and experience place physicians in a better position than the manufacturer to convey complex medical information and terminology to patients. Second, the physician has a relationship with the individual patient, making it possible to evaluate the patient's treatment needs and provide an assessment of the potential benefits and likely risks specific to the patient's medical and family history. Third, it is more effective and efficient for manufacturers to provide a common set of warnings to an intermediary with more definable knowledge and skill characteristics than to a broad spectrum of consumers. It is difficult, if not impossible, to convey comprehensive drug warnings to consumers due to the highly technical nature of the information and variations in the needs of individual patients.

This provision in the Model PLA draws from states that have codified the doctrine as well as Section 6(d) of the Restatement Third. *See, e.g.,* Miss. Code Ann. § 11-1-63(c); N.J. 2A:58C-4; N.C. Gen. Stat. § 99B-5(c); Ohio Rev. Code Ann. § 2307.76.

Section 7. {Warnings to third parties.}

Section 7 incorporates Section 15 of the 1995 Act without modification. It codifies the bulk supplier doctrine and the sophisticated user defenses.

Bulk suppliers are those who sell their products in bulk, generally to other businesses. These suppliers may not know how the product will be used and may not be able to attach a label or instructions to the raw material or component. The bulk supplier doctrine, therefore, states that a bulk supplier's or raw material manufacturer's duty to warn consumers, or other end users, of the risks of its product is discharged by warning the product's immediate purchaser. It is the immediate purchaser's responsibility to include appropriate warnings when selling those materials or products to others.

The sophisticated user doctrine recognizes that users with superior knowledge of a product are or should already be well-aware of the product's risks. As with the bulk supplier doctrine, the law here anticipates that sophisticated users are businesses, not average individuals. Both provisions recognize that there are special challenges in conveying warnings regarding certain products in the workplace. In these instances, the obligation to warn falls on the party in the best position – because they are the most knowledgeable or informed – to provide such warnings.

Section 8. {Liability of product sellers.}

Section 8 modifies and simplifies Section 16 of the 1995 Act in accordance with product seller statutes enacted in several states. Absent legislation, traditional product liability law allows imposition of liability on wholesalers, distributors, and retailers for harm caused by a defective product, even if it was not aware of and could not have discovered the defect. An innocent seller can be named in a lawsuit simply because of its presence in the chain of distribution. This is often done for strategic litigation purposes, particularly when the "innocent seller" is a local mom-and-pop business, such as a corner pharmacy or grocery store. They are swept up as part of the "sue-everyone" mentality and their presence in the litigation can permit the plaintiff to pick certain favorable jurisdictions to have his or her claims heard. More than half of state legislatures have adopted innocent seller protection to address this problem.

Section 8 of the Model PLA draws from these laws to provide that a product seller, other than the manufacturer, is not subject to suit in a product liability action unless the seller designed or modified the product, or provided an express warranty. A product seller may also be subject to a product liability lawsuit if the plaintiff is unable to proceed with a claim against the manufacturer, such as when the manufacturer is unknown, not subject to service of process, or the manufacturer is insolvent or otherwise judgment proof. The language in this provision is based on the Alabama and Tennessee laws. *See* S.B. 184 (Ala. 2011); H.B. 2008 (Tenn. 2011). Finally, paragraph (B) retains a section of the 1995 Act that clarifies that although product sellers other than the manufacturer are not subject to strict liability absent application of one of the enumerated exceptions, they continue to have a duty of reasonable care in their sale of the product.

Section 9. {Alcohol and drug defense.}

Section 9 incorporates Section 17 of the 1995 Act without modification. It codifies the commonsense principle that an individual injured while drunk or under the influence of an illicit drug should not be able to shift responsibility for his or her injury on a product manufacturer where the influence of alcohol or drugs played the greatest role in causing the injury.

Section 10. {Subsequent remedial measures.}

Section 10 incorporates Section 18 of the 1995 Act without modification. It codifies a well-accepted principle of evidentiary law that is intertwined with product liability law – evidence that a manufacturer took steps to improve the safety of a product after an injury is inadmissible to prove that the earlier product was defective. This rule furthers product safety by encouraging manufacturers to learn from accidents and promptly modify their products to avoid future harm, rather than place them at significant risk of liability for doing so.

Section 11. {Concert of action.}

Section 11 incorporates Section 20 of the 1995 Act without modification. This section reacts to the inappropriate use of "concert of action" claims as a means of circumventing product liability requirements. Traditional application of "concert of action" theory involves conduct by a small number of individuals whose actions resulted in a tort against a single plaintiff, usually over a short span of time. The defendants are held jointly liable for the plaintiff's injuries.

Most jurisdictions that have considered this theory have rejected its application to product liability cases, which involve numerous manufacturers that compete against each other. Often, the assertion is that the manufacturers shared involvement in regulatory or legislative activities, or collectively worked towards voluntary industry safety standards through industry associations. The Model PLA recognizes that "concert of action" claims must show conscious and deliberate agreement to, acknowledgment of, and collaborative participation in wrongful conduct by two or more persons. These other activities are legitimate, helpful endeavors that should be encouraged.

Section 12. {Specific Product Identification}

Section 12 is a new provision addressing instances in which plaintiffs have sought to impose liability based on a market share, enterprise, or other industry wide liability. For example, in the case accredited as the origin of market share liability, the California Supreme Court shifted the burden to the manufacturers of a widely distributed prescription drug to prove that they did not manufacture the drug that caused the plaintiff's harm. *See Sindell v. Abbott Laboratories, Inc*., 607 P.2d 924 (Cal. 1980). Otherwise, each defendant would be liable for a share of the plaintiff's injury equal to its share of the market for the product. The theory was adopted by fewer than a half-dozen courts in diethylstilbesterol (DES) cases. Most courts have rejected market-share liability in a variety of contexts, including cases involving asbestos, handguns, vaccines, breast implants, blood products, and lead paint.

Enterprise liability is another burden-shifting theory with some similarities to market-share theory. Enterprise liability stems from a New York federal court case, where only a handful of companies made a product, blasting caps, and it was not possible to determine the identity of the product that harmed the plaintiffs. *Hall ex rel. Hall v. E.I. du Pont de Nemours & Co.*, *Inc.,* 345 F. Supp. 353, 378 (E.D.N.Y. 1972). Because there was a strong likelihood that the blasting caps were produced by one of six major manufacturers, the court declined to dismiss the complaints

and indicated that it might be appropriate to shift the burden of causation to the defendants. Courts almost universally have rejected the theory or found it inapplicable under the facts of a particular case.

The language of this section of the Model PLA is based on legislation adopted by the Ohio General Assembly in 2006. *See* Ohio Code § 2307.73(C).

Section 13. {Incorporation of Other ALEC Model Acts.}

Since 1995, ALEC has adopted several model acts important to products liability claims, including some that cover topics included in the 1995 Act. These other model acts provide an important source for model legislation affecting products liability actions. The Model PLA includes by reference the following ALEC model bills:

- The **Regulatory Compliance Congruity With Liability Act** (adopted 2007) offers options for addressing the impact of regulatory compliance and product approvals on liability. This model act replaces the government standards defense included in Section 5 of the 1995 Act and regulatory approval defense for adequate warning or instruction, which was in Section 14(A)(2) of the 1995 Act.

- The **Assumption of Risk Act** (adopted 1995) continues to provide language for legislators interested in including such a provision in product liability legislation. This model act replaces Section 13 of the 1995 Act.

- The **Reliability in Expert Testimony Standards Act** (adopted 2000, revised 2005) provides current ALEC policy on expert testimony standards. This model act replaces Section 19 of the 1995 PLA. The 1995 Act was outdated in that it preceded recognition of the importance of the U.S. Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) and its progeny. In those cases, the Supreme Court deputized judges to serve as "gatekeepers" for the reliability of expert testimony and required expert testimony to follow scientific methods.

- The **Ten-Year Statute of Repose Act** (adopted 2002) provides that an injury occurring ten years after a product is sold is presumed to not result from a defect in the product, with certain exceptions. Approximately twenty states have similar laws.

- The **Asbestos and Silica Claims Priorities Act** (adopted 2003, revised 2006) ensures that those who are truly sick from exposure to asbestos or silica receive prompt, fair and efficient adjudication of their claims by requiring claimants to meet certain medical criteria for showing a physical impairment before proceeding with their claims. At least six states have adopted such medical criteria requirements through legislation. Several courts have taken similar steps through judicial action.

- The **Asbestos Claims Transparency Act** (adopted 2007) assures that courts and litigants have available to them information as to payments an asbestos claimant has or may receive from asbestos-related bankruptcy trusts.

- The **Transparency in Lawsuits Protection Act** (adopted 2007) provides that a court shall not create a new private right of action on the basis of a statute that provides regulatory requirements, such as product safety standards, unless the state legislature specifically provides a right to sue. Georgia was the first state to adopt legislation based on this model act in 2010.

American Legislative Exchange Council
TASK FORCE OPERATING PROCEDURES

I. MISSION OF TASK FORCES

Assume the primary responsibility for identifying critical issues, developing ALEC policy, and sponsoring educational activities which advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty. The mission will be accomplished through a non-partisan, public and private partnership between ALEC's legislative and private sector members in the specific subject areas assigned to the Task Force by the Board of Directors.

II. TASK FORCE RESPONSIBILITIES

A. Task Forces have the primary responsibility for identifying critical issues and developing ALEC's official policy statements and model legislation appropriate to the **specific subject areas** of the Task Force.

B. Task Forces serve as forums for an exchange of ideas and sharing of experiences between ALEC's state legislator and private sector members.

C. Task Forces are responsible for developing and sponsoring the following educational activities appropriate to the specific subject area of the Task Force:

- publications that express policy positions, including, but not limited to State Factors and Action Alerts;
- educational communication and correspondence campaigns;
- issue specific briefings, press conferences and press campaigns;
- witness testimony and the activities of policy response teams;
- workshops at ALEC's conferences; and
- specific focus events.

D. The Executive Director is to develop an **annual budget**, which shall include expenses associated with Task Force meetings and educational activities. A funding mechanism to finance all meetings and educational activities proposed by Task Forces must be available before they can be undertaken.

III. GENERAL PROCEDURES

A. Requests from ALEC members for policy statements, model legislation and educational activities shall be directed by the Executive Director to the appropriate Task Force, or the Board of Directors if the issue does not fall within the **jurisdiction** of any Task Force. The appropriate Public and Private Sector Task Force Co-Chairs determine the agenda for each Task Force meeting, and the meetings will be called and conducted in accordance with these Operating Procedures.

The Director of Policy with the consent of the Executive Director assigns a model bill or resolution to the most appropriate Task Force based on Task Force content and prior jurisdictional history 35 days before a Task Force Meeting. All Task Force Co-Chairs will be provided an email or fax summary of all **model bills and resolutions 35 days before** the Task Force meeting

If both the Co-Chairs of a Task Force are in agreement that they should have jurisdiction on model legislation or a resolution, the legislation or resolution will be considered by the Task Force. If the other Task Force Co-Chairs believe they should have jurisdiction or if the author of the model bill or resolution does not agree on the jurisdictional assignment of the bill, they will have **10 days after the 35-day mailer deadline** to submit in writing or by electronic appeal to the Director of Policy their intent to challenge the jurisdiction assignment. The Director of Policy will notify the Executive Director who will in turn notify the National Chair and the Private Enterprise Board Chair. The National Chair and the Private Enterprise Board Chair will in turn refer the matter in question to the Board of Directors Task Force Board Committee. The Director of Policy will establish a conference call for the Task Force Board Committee co- chairs, the author, the affected Task Force Co-Chairs and the Director of Policy at a time convenient for all participants.

The Task Force Board Committee Co-Chairs shall listen to the jurisdictional dispute by phone or in person within 10 days of the request. If both Task Force Board Committee Co-Chairs are in agreement that the Director of Policy made an incorrect jurisdictional referral, only then will the model bill or resolution be reassigned to a committee as they specify once agreed upon by the **National Chair and the Private Enterprise Board Chair**. The bill or model resolution is still eligible to be heard in whatever Task Force it is deemed to be assigned to as if submitted to the correct Task Force for the 35-

day mailer. The National Chair and the Private Enterprise Board Chair decision is final on this model bill or resolution.

Joint referral of model legislation and/or resolutions are allowed if all the affected Task Force Co-Chairs agree. All model legislation and resolutions that have been referred to, more than one Task Force must pass the identical language in both Task Forces within two consecutive Task Force meetings. It is at the Task Force Co-Chairs discretion how they will handle the hearings of the model legislation or resolution. Both sets of co-chairs have the ability to call a working group, subcommittee, or simply meet consecutively or concurrently if necessary.

If the Task Force co-chairs both agree to waive jurisdiction, they may do so as long as another Task Force still has jurisdiction.

The National Chair and the Private Sector Board Chair will rely upon the Task Force Board Committee Co-Chairs for advice and recommendations on model legislation or resolutions when no jurisdiction in any of the existing Task Forces in operation can be found. The Task Force Board Committee Co-Chairs will work with the Executive Director and the Director of Policy to identify public and private sector Task Force members (not alternates) from the existing Task Forces should their expertise be of assistance to the Task Force Board Committee in reaching a determination and recommendation for approval by the National Chair and the Private Enterprise Board Chair.

B. **The National Chair and the Private Sector Board Chair** will rely upon the Task Force Board Committee Co-Chairs for advice and recommendations on model legislation or resolutions when no jurisdiction in any of the existing Task Forces in operation can be found. The Task Force Board Committee Co-Chairs will work with the Executive Director and the Director of Policy to identify public and private sector Task Force members (not alternates) from the existing Task Forces should their expertise be of assistance to the Task Force Board Committee in reaching a determination and recommendation for approval by the National Chair and the Private Enterprise Board Chair.

C. **The Board of Directors** shall have ultimate authority over Task Force procedures and actions including the authority to create, to merge or to disband Task Forces and to review Task Force actions in accordance with these Operating Procedures. Nothing in these Operating Procedures prohibits the Board of Directors from developing ALEC policy; however, such a practice

should be utilized only in exceptional circumstances. Before the policy is adopted by the Board of Directors, it should be sent to the Public and Private Sector Task Force Co-Chairs under whose jurisdiction the matter falls for review and comment back to the Board of Directors.

D. The **operating cycle of a Task Force** is two years. A new operating cycle begins on January 1 of each odd numbered year and ends on December 31 of the following even numbered year. Task Force activities shall be planned and budgeted on an annual basis within each two-year operating cycle.

E. If a Task Force is **unable to develop an operating budget**, the Board of Directors will determine whether to continue the operations of the Task Force. This determination will be made according to: (1) the level of membership on the Task Force, and (2) the need for continued services developed by the Task Force for ALEC.

F. **The Board of Directors** shall have the authority to allocate limited general support funds to finance the annual operating budget of Task Forces that meet the requirements prescribed in Section III (E). The Executive Director shall determine, and report to the Board of Directors, the amount of general support funds available to underwrite such Task Forces.

IV. MEMBERSHIP AND MEMBER RESPONSIBILITIES

A. The membership of a Task Force consists of legislators who are members in good standing of ALEC and are duly appointed to the Task Force, in accordance with Section VI (A) and private sector organizations that are full members of ALEC, contribute to the assessment for the Task Force operating budget, and are duly appointed to the Task Force, in accordance with Section VI (B). Private sector organizations that were full members of ALEC and contributed the assessment for the Task Force's operating budget in the previous year, can be appointed to the Task Force for the current year, conditional upon renewal of full ALEC membership and receipt of the current year's assessment for the Task Force operating budget prior to March 31st, unless an alternative date has been approved by the Executive Director.

B. Each Task Force shall have least two **Co-Chairs**; a Public Sector Task Force Co-Chair and a Private Sector Task Force Co-Chair. The Public Sector Task Force Co-Chair must be a member of the Task Force and appointed in

accordance with Section VI (A). The Private Sector Co-Chair must represent a private sector member of the Task Force and be appointed in accordance with Section VI(B). The Co-Chairs shall be responsible for:

(1) calling the Task Force and the Executive Committee meetings to order, setting the agenda and co-chairing such meetings;
(2) appointing and removing legislators and private sector members to and from the Task Force Executive Committee and subcommittees;
(3) creating subcommittees, and determining each subcommittee's mission, membership limit, voting rules, deadlines, and term of service; and
(4) selecting Task Force members to provide support for and against Task Force policies during formal Board reviews.

C. Each Task Force shall have an **Executive Committee** appointed by the Public and Private Sector Task Force Co-Chairs that is appropriate in number to carry out the work product and strategic plan of ALEC and the Task Force. The Executive Committee shall consist of the Public Sector Task Force Co-chair, the Private Sector Task Force Co-Chair, the subcommittee co-chairs, and the remainder will be an equal number of legislative and private sector Task Force members. The Executive Committee will be responsible for determining the operating budget and proposing plans, programs and budgets for the succeeding year in accordance with (Section V (B); determining if a proposed educational activity conforms to a previously approved model bill, resolution or policy statement in accordance with (Section IX (F); and determining if an emergency situation exists that justifies waiving or reducing appropriate time limits in accordance with (Section VIII (H)).

D. Each Task Force may have any number of **subcommittees**, consisting of Task Force members and advisors to focus on specific areas and issues and make policy recommendations to the Task Force. The Task Force Co-chairs, shall create subcommittees and determine each subcommittee's mission, membership limit, voting rules, deadlines, and term of service. Any model bill, resolution or policy statement approved by a subcommittee must be approved by the Task Force before it can be considered official ALEC policy.

E. Each Task Force may have advisors, appointed in accordance with Section VI (G). **Advisors** shall assist the members and staff of the Task Force. They shall be identified as advisors on official Task Force rosters, included in all official

Task Force mailings and invited to all Task Force meetings. Advisors may also have their expenses paid at Task Force meetings covered by the Task Force operating budget with the approval of the Task Force Co-Chairs. An advisor cannot be designated as the primary contact of a private sector Task Force member, cannot be designated to represent a private sector Task Force member at a Task Force, Executive Committee, or subcommittee meeting, and cannot offer or vote on any motion at a Task Force, Executive Committee, or subcommittee meeting.

V. Task Force Budgets

A. Each Task Force shall develop and operate a yearly budget to fund meetings.

B. The **operating budget** shall be used primarily to cover expenses for Task Force meetings, unless specific funds within the budget are authorized for other use by the Task Force. The operating budget shall be assessed equally among the private sector members of the Task Force. The Executive Director, in consultation with the Task Force Co-Chairs shall determine which costs associated with each meeting will be reimbursed from the operating budget. Any funds remaining in a Task Force's operating budget at the end of a year are transferred to ALEC's general membership account.

C. The operating budget shall not be used to cover Task Force meeting expenses associated with **alternate task force members'** participation, unless they are appointed by their State Chair to attend the Spring Task Force Summit with the purpose to serve in place of a Task Force Member who is unable to attend. Task Force meeting expenses of alternate task force members shall be covered by their state's scholarship account.

D. The **programming budget** shall be used to cover costs associated with educational activities. Contributions to the programming budget are separate, and in addition to operating budget contributions and annual general support/membership contributions to ALEC. The Executive Director shall determine the contribution required for each educational activity.

VI. PROCESS FOR SELECTING TASK FORCE MEMBERS, CHAIRS, COMMITTEES AND ADVISORS

A. Prior to February 1 of each odd-numbered year, the current and immediate past National chairman will jointly select and appoint in writing **three legislative members and three alternates to the Task Force** who will serve for the current operating cycle, after receiving nominations from ALEC's Public and Private State Chairs, the Executive Director and the ALEC Public and Private Sector members of the Board. At any time during the year, the National Chairman may appoint in writing new legislator members to each Task Force, except that no more than three legislators from each state may serve as members of any Task Force, no legislator may serve on more than one Task Force and the **appointment cannot be made earlier than thirty days** after the new member has been nominated. In an effort to ensure the nonpartisan nature of each Task Force, it is recommended that no more than two legislators of any one political party from the same state be appointed to serve as members of any Task Force. A preference will be given to those ALEC legislator members who serve on or chair the respective Committee in their state legislature. A preference will be given to legislators who sponsor ALEC Task Force model legislation in the state legislature.

B. Prior to January 10 of each odd-numbered year, the current and immediate past National Chairman will jointly select and appoint in writing **the Task Force Chair** who will serve for the current operating cycle, after receiving nominations from the Task Force. Nominations will be requested by the outgoing Task Force Chair and may be placed in rank order prior to transmittal to the Executive Director no later than December 1 of each even-numbered year. No more than five names may be submitted in nomination by the outgoing Task Force chair. The current and immediate past National Chairmen will jointly make the final selection, but should give strong weight to the recommendations of the outgoing Task Force Chair. In an effort to empower as many ALEC leaders as possible, State Chairs and members of the Board of Directors will not be selected as Task Force Chairs. Task Force Chairs shall serve for one operating cycle term. Where special circumstances warrant, the current and immediate past National Chairmen may reappoint a Task Force Chair to a second operating cycle term.

C. Prior to February 1 of each odd numbered year, the Public and Private Sector Task Force Co-Chairs will select and appoint in writing the legislative and private sector members of the **Task Force Executive Committee**, who will serve for the current operating cycle. The Public and Private Sector Task Force Co-Chairs will select and appoint in writing the legislative and private sector members and advisors to any subcommittee.

D. Prior to February 1 of each year, the Private Enterprise Board Chair and the immediate past Private Enterprise Board Chair will select and appoint in writing the private sector members to the Task Force who will serve for the current year. The appointment letter shall be mailed to the individual designated as the primary contact for the private sector entity. At any time during the year, the Chair of the Private Enterprise Board may appoint in writing **new private sector members** to each Task Force, but no earlier than thirty days after the new member has qualified for full membership in ALEC and contributed the assessment for the appropriate Task Force's operating budget.

E. Prior to January 10 of each odd-numbered year, the Chair of the Private Enterprise Board and the immediate past Private Enterprise Board Chair will select and appoint in writing the **Task Force Private Sector Co-Chair** who will serve for the current operating cycle, after receiving nominations from the Task Force. Nominations will be requested by the outgoing Task Force Private Sector Chair and may be placed in rank order prior to transmittal to the Chair of the Private Enterprise Board. The Chair and the immediate past Chair of the Private Enterprise Board will make the final selection, but should give strong weight to the recommendations of the outgoing Private Sector Task Force Co-Chair. In an effort to empower as many ALEC private sector members as possible, Private Enterprise State Chairs and members of the Private Enterprise Board will not be selected as Private Sector Task Force Co-Chairs. Private Sector Task Force Co-Chairs shall serve for one operating cycle term. Where special circumstances warrant, the current and immediate past Chair of the Private Enterprise Board may reappoint a Task Force Private Sector Chair to a second operating cycle term.

F. Prior to February 1 of each odd-numbered year, the Task Force Private Sector Co-Chair will select and appoint in writing the **private sector members of the Task Force Executive Committee**, who will serve for the current operating cycle. The Task Force Private Sector Co-Chair shall select and appoint in writing the private sector members of any subcommittees.

G. The Public and Private Sector Task Force Co-Chairs, may jointly appoint subject matter experts to serve as **advisors** to the Task Force. The National Chair and the Private Enterprise Board Chair may also jointly recommend to the Task Force Co-Chairs subject matter experts to serve as advisors to the Task Force.

VII. REMOVAL AND VACANCIES

A. The National Chair may remove any Public Sector **Task Force Co-Chair** from his position and any legislative member from a Task Force with or without cause. Such action will not be taken except upon thirty days written notice to such Chair or member whose removal is proposed. For purposes of this subsection, cause may include failure to attend two consecutive Task Force meetings.

B. The Public Sector Task Force Co-Chair may remove any legislative member of an **Executive Committee or subcommittee** from his position with or without cause. Such action shall not be taken except upon thirty days written notice to such member whose removal is proposed. For purposes of this subsection, cause may include failure to attend two consecutive meetings.

C. The Chairman of the Private Enterprise Board may remove **any Private Sector Task Force Co-Chair** from his position and any private sector member from a Task Force with cause. Such action shall not be taken except upon thirty days written notice to such Chair or member whose removal is proposed. For purposes of this subsection, cause may include but is not limited to the non-payment of ALEC General Membership dues and the Task Force dues. .

D. The Private Sector Task Force Co-Chair may remove any **private sector member of an Executive Committee or subcommittee** from his position with cause. Such action shall not be taken except upon thirty days written notice to such member whose removal is proposed. For purposes of this subsection, cause may include but is not limited to the non-payment of ALEC General Membership dues and the Task Force dues.

E. The Public and Private Sector Task Force Co-Chairs may remove an **advisor** from his position with or without cause. Such action shall not be taken except upon thirty days written notice to such advisor whose removal is proposed.

F. Any member or advisor may **resign** from his position as Public Sector Task Force Co-Chair, Private Sector Task Force Co-Chair, public or private sector Task Force member, Task Force advisor, Executive Committee member or subcommittee member at any time by writing a letter to that effect to the Public Sector and Private Sector Task Force Co-Chairs. The letter should specify the

effective date of the resignation, and if none is specified, the effective date shall be the date on which the letter is received by the Public and Private Task Force Co-Chairs.

G. All **vacancies** for Public Sector Task Force Co-Chair, Private Sector Task Force Co-Chair, Executive Committee member and subcommittee member shall be filled in the same manner in which selections are made under Section VI. All vacancies to these positions must be filled within thirty days of the effective date of the vacancy.

VIII. MEETINGS

A. **Task Force meetings** shall only be called by the joint action of the Public and Private Sector Task Force Co-Chairs. Task Force meetings cannot be held any earlier than thirty-five days after being called, unless an emergency situation has been declared pursuant to Section VIII (H), in which case Task Force meetings cannot be held any earlier than ten days after being called. It is recommended that, at least once a year, the Task Forces convene in a common location for a joint Task Force Summit. **Executive Committee meetings** shall only be called by the joint action of the Public and Private Sector Task Force Co-Chairs and cannot be held any earlier than three days after being called, unless the Executive Committee waives this requirement by unanimous consent.

B. **At least forty-five days** prior to a task force meeting any model bill, resolution or policy must be submitted to ALEC staff that will be voted on at the meeting. At least thirty-five days prior to a Task Force meeting, ALEC staff shall distribute copies of any model bill, resolution or policy statement that will be voted on at that meeting. This requirement does not prohibit modification or **amendment** of a model bill, resolution or policy statement at the meeting. This requirement may be waived if an emergency situation has been declared pursuant to Section VIII(H).

C. **All Task Force meetings are open** to registered attendees and invited guests of ALEC meetings and conferences. Only regular Task Force Members may introduce any resolution, policy statement or model bill. Only Task Force members will be allowed to participate in the Task Force meeting discussions

and be seated at the table during Task Force meetings, unless otherwise permitted by the Public and Private Sector Task Force Co-Chairs.

D. ALEC private sector member organizations may only be represented at Task Force and Executive Committee meetings by the individual addressed in the **appointment letter** sent pursuant to Section VI (D) or a designee of the private sector member. If someone other than the individual addressed in the appointment letter is designated to represent the private sector member, the designation must be submitted in writing to the Public and Private Sector Task Force Co-Chairs before the meeting, and the individual cannot represent any other private sector member at the meeting.

E. All Task Force and Executive Committee meetings shall be conducted under the guidelines of **Roberts Rules of Order**, except as otherwise provided in these Operating Procedures. A copy of the Task Force Operating Procedures shall be included in the briefing packages sent to the Task Force members prior to each meeting.

F. A majority vote of legislative members present and voting and a majority vote of the private sector members present and voting, polled separately, are required to approve any motion offered at a Task Force or Executive Committee meeting. A **vote** on a motion to reconsider would be only with the sector that made the motion. Members have the right, in a voice vote, to abstain and to vote present by roll-call vote. In all votes a member can change their vote up until the time that the result of the vote is announced. Only duly appointed members or their designee as stated in Section VIII (D) that are present at the meeting may vote on each motion. **No proxy, absentee or advance voting is allowed.**

G. The Public Sector Task Force Co-Chair and the Private Sector Task Force Co-Chair, with the concurrence of a majority of the Executive Committee, polled in accordance with Section VIII (F), may schedule a **Task Force vote by mail or any form of electronic communication** on any action pertaining to policy statements, model legislation or educational activity. The deadline for the receipt of votes can be no earlier than thirty-five days after notification of the vote is mailed or notified by any form of electronic communication, unless an emergency situation is declared pursuant to Section VIII (H), in which case the deadline can be no earlier than ten days after notification is mailed or notified by any form of electronic communication. Such votes are exempt from all rules in Section VIII, except: (1) the requirement that copies of model legislation and

policy statements be mailed or notified by any form of electronic communication with the notification of the vote and (2) the requirement that a majority of legislative members voting and a majority of the private sector members voting, polled separately, is required to approve any action by a Task Force.

H. For purposes of Sections VIII(A), (B) and (G), an **emergency situation** can be declared by:

(1) Unanimous vote of all members of the Task Force Executive Committee present at an Executive Committee meeting prior to the meeting at which the Task Force votes on the model bill, resolution or policy statement; or

(2) At least three-fourth majority vote of the legislative and private sector Task Force members (voting in accordance with Section VIII (F)) present at the meeting at which the members vote on the model bill, resolution or policy statement.

I. Ten Task Force members shall **constitute a quorum** for a Task Force meeting. One-half of the legislative and one-half of the private sector members of an Executive Committee shall constitute a quorum for an Executive Committee meeting.

IX. *REVIEW AND ADOPTION PROCEDURES*

A. All Task Force policy statements, model bills or resolutions shall become **ALEC policy** either: (1) upon adoption by the Task Force and affirmation by the Board of Directors or (2) thirty days after adoption by the Task Force if no member of the Board of Directors requests, within those thirty days, **a formal review by the Board of Directors**. General information about the adoption of a policy position may be announced upon adoption by the Task Force.

B. The Executive Director shall notify the Board of Directors of the approval by a Task Force of any policy statement, model bill or resolution within ten days of such approval. Members of the Board of Directors shall have thirty days from the date of Task Force approval to review any new policy statement, model bill or resolution prior to adoption as official ALEC policy. Within those thirty days, any member of the Board of Directors may request that the policy be

formally reviewed by the Board of Directors before the policy is adopted as official ALEC policy.

C. A member of the Board of Directors may request a formal review by the Board of Directors. The **request must be in writing** and must state the cause for such action and a copy of the letter requesting the review shall be sent by the National Chairman to the appropriate Task Force Chair. The National Chairman shall schedule a formal review by the Board of Directors no later than the next scheduled Board of Directors meeting.

D. The review process will **consist of key members of the Task Force**, appointed by the Task Force Chair, providing the support for and opposition to the Task Force position. Position papers may be faxed or otherwise quickly transmitted to the members of the Board of Directors. The following is the review and adoption procedures:

- **Notification of Committee**: Staff will notify Task Force Chairs and the entire task force when the Board requests to review one of the Task Forces' model bills or resolutions.

- **Staff Analysis**: Will be prepared in a neutral fashion. The analyses will include:
  - History of Task Force action
  - Previous ALEC official action/resolutions
  - Issue before the board
  - Proponents arguments
  - Opponents arguments

- **Standardized Review Format**: To ensure fairness, a set procedure will be used as the format to ensure the model bill/resolution has a fair hearing before the Board.
  - Task Force Chair(s) will be invited to attend the Board Review
  - Task Force Chair(s) will decide who will present in support and in opposition for the model bill/resolution before the Board.
  - Twenty minutes that is equally divided will be given for both sides to present before the Board.
  - It is suggested that the Board not take more than twenty minutes to ask questions of the presenters.
  - Presenters will then be excused and the Board will have a suggested twenty more minutes for discussion and vote.

- All votes will be recorded for the official record.

- **Notification of Committee**: The Director of Policy will notify presenters immediately after the vote. If the Board votes to send the model bill/resolution back to the task force, the Board will instruct the Director of Policy or another board member what to communicate.

E. **The Board of Directors can**:

(1) Vote to affirm the policy or affirm the policy by taking no action, or
(2) Vote to disapprove the policy, or
(3) Vote to return the policy to the Task Force for further consideration providing reasons therefore.

F. Task Forces may only undertake educational activities that are based on a policy statement, model bill or resolution that has been adopted as official ALEC policy, unless the Task Force votes to undertake the educational activity, in which case the educational activity is subjected to the same review process outlined in this Section. It is the responsibility of the Task Force Executive Committee to affirm by three-fourths majority vote conducted in accordance with Section VIII that an educational activity conforms to a policy statement, model bill or resolution.

X. EXCEPTIONS TO THE TASK FORCE OPERATING PROCEDURES.

Exceptions to these Task Force Operating Procedures must be approved by the Board of Directors.

Mission Statement

The American Legislative Exchange Council's mission is…

To advance the Jeffersonian Principles of free markets, limited government, federalism, and individual liberty through a nonpartisan public-private partnership among America's state legislators, concerned members of the private sector, the federal government, and the general public.

To promote these principles by developing policies that ensure the powers of government are derived from, and assigned to, first the People, then the States, and finally the Federal Government.

To enlist state legislators from all parties and members of the private sector who share ALEC's mission.

To conduct a policy making program that unites members of the public and private sector in a dynamic partnership to support research, policy development, and dissemination activities.

To prepare the next generation of political leadership through educational programs that promote the principles of Jeffersonian democracy, which are necessary for a free society.

Civil Justice Task Force Meeting
ALEC's 2011 Annual Meeting
New Orleans, Louisiana
August 6, 2011
Meeting Minutes

Amy Kjose gave the task force update.

Matt Fullenbaum gave the state legislative reform update.

Carey Roberts of Casteel & Roberts presented on tort reform passed and considered this year in Texas.

William Large of the Florida Justice Reform Institute shared insights on legislative victories this year in Florida.

Cary Silverman presented the *Phantom Damages Elimination Act* to the Task Force. The model bill passed unanimously in both the private sector and public sector.

Oriana Senatore of the US Chamber ILR presented on the issue of Third-Party Litigation.

Page Falk of the US Chamber ILR presented the *Promoting 'Merit' in Merit Selection Act* to the Task Force. The model bill passed unanimously in the private sector and on an 11-7 vote in the Public Sector.

Trey Gillespie of Property Casualty Insurers of American gave a presentation on general issues in workers' compensation.

Rep. Marvin Kleeb presented the *Employer Good Faith and Safe Harbor Act*. The Task Force tabled the bill for future consideration.

Victor Schwartz discussed the Supreme Court rulings from the past term that impacted the Civil Justice Task Force.

Meeting adjourned.